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NTSB Order No. EA-3759

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of December, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. THOMAS PETER HEIDENBERGER, Respondent.	Docket SE-10769

OPINION AND ORDER

Respondent has appealed from an initial decision of Administrative Law Judge William A. Pope, II, issued orally at the conclusion of an evidentiary hearing held on June 29, 1990.[1] By that decision, the law judge affirmed an order of the Administrator holding respondent in violation of sections

[1]An excerpt from the transcript containing the initial decision is attached.

91.75(a) and (b), and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91),[2] in connection with a flight conducted on November 29, 1988.[3]

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order and the law judge's initial decision. We will therefore deny respondent's appeal for the reasons set forth below.

In his order (which served as the complaint), the Administrator alleged the following:

"1. You are now, and at all times mentioned herein were, the holder of Airline Transport Pilot

[2]FAR §§ 91.75(a) and (b), and 91.9, which have since been amended and recodified as §§ 91.123(a) and (b), and 91.13(a), respectively, read as follows:

"§ 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from canceling an IFR [instrument flight rules] flight plan if he is operating in VFR [visual flight rules] weather conditions. If a pilot is uncertain of the meaning of an ATC clearance, he shall immediately request clarification from ATC.

(b) Except in an emergency, no person may, in an area where air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]The Administrator has waived the imposition of a sanction for such alleged FAR violations, in accordance with the Aviation Safety Reporting Program.

Certificate No. 217465733.

2. On or about November 29, 1988, you operated Civil Aircraft N348US, a Boeing 737, as pilot-in-command of a regularly scheduled passenger carrying flight in air transportation designated as Piedmont Flight 1154 from San Diego, California to Phoenix, Arizona.

3. Incident to said flight you were cleared for a visual approach to Sky Harbor Airport with a restriction to cross 17 DME on the [l]ocalizer at or above 6000 feet.

4. Notwithstanding the above you descended below your assigned altitude prior to reaching 17 DME.

5. Your operation of Civil Aircraft N348US, as set forth above, was careless so as to endanger the life and property of others."

The record discloses that respondent acted as non-flying pilot on Flight 1154, which had previously been cleared for an Arlin Six arrival with a freeway visual approach to Phoenix Sky Harbor Runway 8R. Prior to the commencement of the approach, respondent's first officer, who was operating the aircraft on autopilot, had his horizontal situation indicator (HSI) switch set in the lateral navigation (LNAV) mode and his navigation radio fixed on automatic tuning.[4] The first officer had also pre-tuned the manual setting on his navigation radio to the Phoenix Sky Harbor localizer frequency, so that he could

[4]This enabled the first officer to monitor information relating to the aircraft's position during the course of the flight. See Tr. 182, 189-90. At the time, respondent had his navigation radio tuned to the Salt River VOR frequency, in order to subsequently facilitate compliance with a standard Arlin Six approach altitude restriction of 3,100 feet six nautical miles (NM) west of the runway's threshold. See id. 92, 183-84; Ex. R-2.

subsequently receive localizer DME information in connection

with the approach.[5]

Before reaching the Arlin navigational fix, the crew was instructed by ATC to depart Arlin at a heading of 50 degrees, join the runway localizer and maintain an altitude of 6,000 feet. Thereafter, the flight was handed off to the approach controller, with whom the following conversation occurred:

"1649:31 [Piedmont 1154] Hello Phoenix Final Piedmont eleven fifty-four is with you descending to six with the airport in sight

1649:36 [Approach Control] Piedmont eleven fifty-four Phoenix approach cross one seven DME west on the Phoenix localizer at or above seven thousand . . .

1649:45 [Piedmont 1154] Well I'll tell you what we got the clearance the other way we were initially cleared to six so ah what do you want to do

1649:51 [Approach Control] Ah should be at seven right now correction six thousand fine cross one seven DME ah west at or above six how's that

1649:58 [Piedmont 1154] That's fine ah seventeen this side at six or above . . . ."[6]

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[5]In order to activate the manually tuned localizer frequency and get a DME reading utilizing it, the first officer needed to either flip his HSI switch from the LNAV position to the VOR-ILS position or change the navigation radio's operational mode from automatic to manual by depressing a button. Id. 146, 188, 190-91. Both crewmembers, who flew together on numerous occasions (id. 71, 158), have indicated that the customary method for accomplishing this was adjustment of the HSI switch. See id. 115-17, 186-88, 191, 197-99.

[6]Ex. A-1.

The first officer, who needed to reference the Phoenix Sky Harbor localizer in order to comply with the above instruction, failed, however, to adjust his HSI switch and activate the localizer frequency.[7] Because of this, he instead received DME information from the Reyno fix, which is located 6 NM west of the Sky Harbor localizer and, as a result, began his descent from 6,000 feet too early, causing the flight to cross 17 DME west of the localizer below that assigned altitude.

In connection with his appeal, respondent argues that the altitude deviation did not result from any act or omission on his part and that there is, therefore, no foundation for the FAR violations with which he has been charged. In this regard, respondent maintains that he was attending to his duties as non-flying pilot at the time of the incident, that he justifiably relied upon his first officer to obtain the proper DME information and perform the approach correctly, and that he should not be required to "ride the controls" for his copilot.[8]

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[7]At the hearing, the first officer indicated that this omission was attributable to the "distraction" created by the approach controller's initial mistaken assignment of a 7,000 foot altitude clearance and the crew's attempt to reconcile it with the previously assigned 6,000 foot clearance. See Tr. 123, 150.

[8]While respondent has also suggested that the law judge improperly applied a strict liability standard in holding him culpable for the FAR violations alleged (see Respondent's Br. 13), such an assertion is wholly without merit, as the law judge explicitly employed the following test for evaluating respondent's potential liability as non-flying pilot-in-command:

> "[H]e is not to be held responsible for every failure on the part of a flying first officer to comply with ATC instructions. The command does not carry with it absolute liability for everything that might go wrong

Respondent further contends that it was impermissible for the Administrator to have brought this action against him while failing to charge his first officer with any FAR violations in connection with the incident.[9]

The Board is not persuaded by these arguments. To begin with, we are of the opinion that respondent must bear a share of the responsibility for the flight's deviation from its assigned altitude because he did not take appropriate steps to assure that his first officer's HSI switch was adjusted at the proper time. In this regard, we note that respondent has indicated that the HSI switch is normally flipped to the VOR-ILS position when an approach clearance is received,[10] and that, on previous flights, he confirmed such action by either seeing his copilot reach up for the switch or hearing the sound it made when it was flipped.[11] Not having identified either of those signs on the flight in question, respondent should have asked his first officer whether the switch had been adjusted. Indeed, the fact that the approach

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> aboard an aircraft. Rather, the test to be applied is whether a non-flying captain and pilot in command did everything a reasonable and prudent captain would do to assure himself that his flying first officer, while at the controls, was operating the aircraft safely." (Tr. 240.)

[9]The Administrator has submitted a reply brief, in which he urges the Board to affirm the initial decision.

[10]Tr. 191, 200.

[11]Id. 197-99. Respondent has related that it was difficult for him to actually observe the position of his copilot's HSI switch because he was restrained in his seat by a shoulder harness and needed to lean forward and far to his right in order to see the switch. Id. 192.

controller's initial mistaken assignment of a 7,000 foot altitude clearance may have temporarily distracted the first officer at precisely the time when the HSI switch is normally flipped made it all the more imperative for respondent to have sought confirmation that that task had been performed.[12]

We further believe that respondent's assertion that he should be exculpated from liability for the FAR violations alleged because he relied upon his first officer to obtain the proper DME information and correctly execute the approach "as he had so many times before"[13] is misplaced. There is simply no legal support for the proposition that a pilot-in-command may assume that a fellow crewmember will perform a task correctly on a particular flight merely because he has done so in the past, no matter how many previous flights form the basis for that assumption.[14] Moreover, we are of the opinion that, if

[12]Although respondent has pointed out that he had various duties to carry out as non-flying pilot at the time in question (performance of checklists, operation of flaps and landing gear, communication with ATC, and observation outside the cockpit for other air traffic), those tasks were routine in nature and their accomplishment should not have interfered with the execution of his duty as pilot-in-command to adequately monitor compliance with ATC instructions. This is especially so where, as here, respondent is the holder of an ATP certificate and is, therefore, "held to the highest degree of care" in the operation of his aircraft. Administrator v. Ferguson and Bastiani, 3 NTSB 3068, 3070 (1980), affirmed 678 F.2d (9th Cir. 1982).

[13]Respondent's Br. 22.

[14]While respondent has cited several cases in which the Board validated a "reliance defense," those decisions do not apply here. Administrator v. Coleman, 1 NTSB 229 (1968), Administrator v. Thomas, 3 NTSB 349 (1977), and Administrator v. Leenerts, NTSB Order EA-2845 (1988), all involved pilots who did not hear or understand ATC instructions and who, upon checking

respondent's position were to be adopted, air safety might well be compromised by a reduction in the degree of vigilance exercised by pilots-in-command in overseeing the conduct of flights in their charge.

Turning to respondent's assertion that the Administrator was not entitled to bring this proceeding against him while taking no action against his first officer, we must point out that we have previously held that "[t]he selection of which cases to prosecute, and the manner in which they are prosecuted, are matters within the discretion of the Administrator, acting pursuant to his statutory authority,"[15] and that our jurisdiction in certificate enforcement actions "extends only to the question of whether safety and the public interest require affirmation of the Administrator's order"[16] and "not . . . to an evaluation of

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with their copilots, were provided with readbacks of such instructions which proved to be incorrect. In Administrator v. Crawford, 5 NTSB 1000 (1986), the pilot directed his copilot to request reconsideration of a "go around" clearance, but the copilot did not relay that request accurately (instead telling ATC that another aircraft which had been on the runway was "turning off [and] we're landing") and ATC's response ("Roger," followed by a windcheck) reinforced his mistaken belief that the copilot had correctly conveyed his reconsideration request. The common thread in each of those cases is that the pilots' reliance upon the actions of others was justifiable. In this case, respondent did not receive any information from his first officer or any other source which would have tended to verify that the HSI switch had been adjusted and we cannot, therefore, find that he had a justifiable basis for believing that the switch had been flipped.

[15]Administrator v. Greiner, 1 NTSB 874, 877 (1970).

[16]Id.

the procedural steps leading to the issuance of that order except when a question arises concerning the Board's own stale complaint rule."[17] We will not, therefore, entertain respondent's claim that the Administrator should be barred from prosecuting this action against him.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's initial decision is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[17] Administrator v. Hunt, 5 NTSB 2314, 2316 (1987).